No. 90-745

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

LINDA WHEELER TARPEH-DOE, individually and as mother and next friend of NYENPAN TARPEH-DOE, and MARILYN L. WHEELER,

Petitioners,

v.

THE UNITED STATES OF AMERICA, and THE SECRETARY OF STATE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

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BRIEF OF THE AMERICAN FOREIGN SERVICE ASSOCIATION AND THE ASSOCIATION OF AMERICAN FOREIGN SERVICE WOMEN AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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This *amici curiae* brief is filed by the American Foreign Service Association and the Association of American Foreign Service Women in support of petitioners. By letters filed with the Clerk of the Court, petitioners and respondents have consented to the filing of this brief.

INTEREST OF THE AMICI CURIAE

The American Foreign Service Association (AFSA) is a professional and labor organization which represents members of the United States Foreign Service. The American Foreign Service Association has 10,000 members. As a labor organization, the American Foreign Service Association is certified as the exclusive representative of all Foreign Service employees of the Department of State and the Agency for International Development (AID). Employees at other foreign affairs agencies, including the United States Information Agency (USIA) and the Department of Agriculture belong to AFSA, the professional association. The American Foreign Service Association regularly represents the interests of members before the United States Congress, the Executive Branch, the Foreign Service Grievance Board, the Foreign Service Labor Relations Board, and the courts.

The Association of American Foreign Service Women (AAFSW) has a membership of 1,425 and represents women foreign service employees or spouses of foreign service employees who are serving or have served in one of the foreign affairs agencies or at a diplomatic mission overseas. The Association actively promotes the interests of women in all facets of Foreign Service life at home and abroad. AAFSW works for the betterment of the quality of family life in the Foreign Service.

For reasons outlined in the petition and addressed by the District Court decision and the dissent below, these *amici* believe the decision of the U.S. Court of Appeals for the District of Columbia Circuit is erroneous. The American Foreign Service Association and the Association of American Foreign Service Women have a strong interest in obtaining a definitive interpretation that claimants who file claims under the Federal Tort Claims Act and the separate statute of August 1, 1956 are entitled to minimum due process in the claims procedure. Because of the Secretary's responsibility under the statute to resolve

foreign-origin tort claims and the potentially profound, adverse impact on all government employees who serve abroad, the American Foreign Service Association and the Association of American Foreign Service Women urge this Court to grant the petition for certiorari.

ARGUMENT

I. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISION OF THE DISTRICT OF COLUMBIA CIRCUIT COURT, IF NOT OVERTURNED, WILL HAVE AN ADVERSE IMPACT ON ALL FEDERAL EMPLOYEES WHO WORK ABROAD.

The decision of the United States Court of Appeals for the District of Columbia Circuit holds that the administrative scheme for handling tort claims arising abroad does not require that the State Department comply with minimum due process standards that are commonly provided in analogous applicant benefit programs. Statutory authority for the Department's jurisdiction is provided by the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671-2680, and in a separate statute enacted on August 1, 1956, 22 U.S.C. § 2669(f), which authorizes the Secretary of State to pay foreign-origin tort claims.

According to figures provided by the Office of Personnel Management, as of August 1990, 81,580 federal government employees currently represent the United States overseas. The Circuit Court decision would permit the Department of State to unilaterally decide the standard of medical care that federal government employees are entitled to receive while serving their country abroad, in an *ex parte* and secret proceeding. The mere potential for arbitrary conduct requires the imposition of at least minimal due process.

The petition for a writ of certiorari demonstrates: 1) contravention of Congressional intent; and 2) persuasive and substantial grounds for urging that the decision

here in question is wrong. The American Foreign Service Association and the Association of American Foreign Service Women join petitioner's submissions without repeating them, and further emphasize the serious, adverse, and far-reaching impact of the decision in question on the ability of the Foreign Service to maintain its ranks, and to attract and recruit an adequate, competent work force. Additionally, the decision in question, if left to stand, will adversely affect the ability of federal government employees who work abroad to be fairly compensated, if at all, for the tortious conduct of the government.

The issues raised by this case are of vital importance to all federal government employees who serve their country abroad. It must be noted that the Medical and Health Program of the Department of State, which is at issue here and which sets out the policies and regulations for the provision of medical treatment and health care applies to all federal employees who work abroad, including the Foreign Service. The Foreign Service Act of 1980, as amended, establishes the obligation of the Department of State to provide such care:

> The Secretary of State shall establish a health care program to promote and maintain the physical and mental health of members of the Service, and (when incident to service abroad) other designated eligible Government employees, and members of the families of such members and employees.

22 U.S.C. § 4084.

Through a formal agreement with other federal agencies, the Department of State is the primary provider of medical treatment and health care for many federal agencies such as:

> other U.S. Government agencies participating in AID programs; U.S. Arms Control and Disarmament Agency (ACDA); U.S. Information Agency; Depart-

ment of Agriculture; Department of Commerce; Geological Survey, Department of the Interior; Center for Communicable Diseases, Department of Health, Education, and Welfare [sic]; Drug Enforcement Agency, Department of Justice; the Library of Congress; National Aeronautics and Space Administration; Federal Aviation Administration and Federal Highway Administration, Department of Transportation; Office of International Affairs, Bureau of Customs, Internal Revenue Services, and Veterans Administration, Department of the Treasury.

3 Foreign Affairs Manual § 681.1. (The Foreign Affairs Manual provides the implementing regulations for the Foreign Service Act of 1980, as amended.) Thus the Circuit Court interpretation of the minimum due process accorded employees who file foreign-origin tort claims will not only adversely affect the thousands of employees employed by the Department of State and the Agency for International Development (AID) and their families, but also the tens of thousands of other federal government employees and their families who live and work abroad.

II. THE DISTRICT OF COLUMBIA CIRCUIT COURT'S DECISION CONFLICTS WITH OTHER CIRCUIT COURT DECISIONS WHICH HAVE HELD THAT APPLICANTS FOR IMPORTANT GOVERNMENT BENEFITS ENJOY A PROPERTY RIGHT REQUIRING AT LEAST MINIMUM DUE PROCESS PROTECTIONS.

This decision contravenes Congressional intent that the Federal Tort Claims Act and the Act of August 1, 1956, provide a merit-based, tort compensation scheme and presents grave implications for Foreign Service employees and all federal government employees who serve their country abroad. As the exclusive remedy for foreign-origin tort claims, the Federal Tort Claims Act should include due process for applicants. *See* 22 U.S.C. § 2702. This Act is analogous to other legislatively-enacted programs that provide important benefits to applicants and usually afford some due process protections in the appli-

cation procedure. Lower courts have held that applicants for certain benefits, such as pension benefits and social security disability benefits, have a property right and attendant due process protections. *See McDarby v. Dinkins*, 907 F.2d 1334 (2d Cir. 1990) and *Allison v. Heckler*, 711 F.2d 145 (10th Cir. 1983). Further, in a case involving benefits for miners under the Federal Coal Mine Health and Safety Act, the Circuit Court addressed the issue of due process procedures by presuming the existence of a property interest and held that the procedures afforded the applicant complied with due process. *See Jordan v. Benefits Review Board*, 876 F.2d 1455 (11th Cir. 1989).

Although certiorari was denied by this Court in *Gregory v. Town of Pittsfield*, 470 U.S. 1018 (1985), it is noteworthy that the dissent found reasonable the provision of minimal procedural protections (written notice explaining the decision, informing the applicant of a statutory right to a hearing) to applicants for general assistance. *Id.* at 1021. We believe that Congress intended that applicants who file claims with the Federal Tort Claims Act receive due process in the claims review process. At a minimum, we believe such due process should include: a right to review and rebut the evidence relied upon by the Department to make its decision, written notification of the decision which includes the rationale, and the right of appeal to an independent body, most of which were afforded by the District Court's order below.

If the Circuit Court decision is allowed to stand then Foreign Service employees, as well as all other federal employees who work abroad, have no meaningful remedy for harm suffered as the result of the tortious misconduct of Department of State medical personnel. Consequently, those public servants who are at the greatest risk of experiencing medical negligence because of their employment in a foreign country are afforded no due process in the sole procedure designed to provide them a remedy.

III. THE DISTRICT OF COLUMBIA CIRCUIT COURT'S CONCLUSION THAT THE SECRETARY OF STATE HAS ABSOLUTE DISCRETION TO GRANT OR DENY FOREIGN-ORIGIN TORT CLAIMS RAISES SERIOUS ISSUES ABOUT THE STANDARD OF CARE TO BE PROVIDED TO FOREIGN SERVICE MEMBERS WHO WORK ABROAD AND REQUIRES AUTHORITATIVE GUIDANCE BY THIS COURT.

The Federal Tort Claims Act makes the United States liable for torts of its employees, where its employees would be liable under local law. As the primary health care provider for U.S. employees abroad, the medical policy of the Department of State provides:

> The general medical policy of the Department of State is to assist all American employees and their dependents in obtaining the best possible medical care. This includes personnel of the Department and all agencies participating in the medical program by agreement. This policy extends to the most remote parts of the world, so that no employee need hesitate to accept an assignment to a post where health conditions are hazardous, medical service poor, or transportation facilities limited.

3 Foreign Affairs Manual § 681.2. The stated medical policy of the Department of State read in a reasonable light suggests that employees who work abroad will receive the same standard of care as that provided to federal government employees who are stateside.

Employees accept employment overseas with the expectation that the medical benefits and treatment they receive will be comparable to that which they would receive in the United States, if not better. *See* 3 Foreign Affairs Manual § 681.2. Yet that expectation can be dashed in the secrecy of the administrative claims process, as evidenced by the history of this case.

In the course of the on-going litigation in the District Court of petitioners' "headquarter's claim," *see* Petition

for Certiorari at 3 n.1, the District Court by Memorandum and Order issued November 13, 1990, ordered the Department to disclose to petitioners an internal memorandum [the "Gaither Memorandum"] which constituted the Department's previously secret decision on the administrative claim. Throughout the litigation in the District Court and in the Circuit Court, the Department had jealously guarded the secrecy of this document, as well as others generated in the administrative claims process.

The Gaither Memorandum revealed that in the administrative claims process, the Department ignored the promises of its Medical and Health care program. Instead, in ascertaining whether any standard of care was breached by the Department physicians in Monrovia, the Department took the position that Mrs. Tarpeh-Doe and her infant son were entitled only to that standard of medical care afforded the average Liberian.

In its Memorandum and Order, the District Court observed, regarding this revelation, as follows:

> This conclusion in the Gaither Memorandum is evidence that this was the standard of care maintained by the State Department for its United States citizen employees (and their dependents) stationed in Liberia. Such evidence could be significantly probative of plaintiffs' allegations of supervisory negligence committed in the United States and proximately causing the injury alleged here.

The Department's conclusion—which was kept secret up until the District Court's order of November 13, 1990—makes a mockery of its own medical policy and blatantly contradicts its own regulations. *See* 3 Foreign Affairs Manual § 681.2.

The Department's position as set forth in the Gaither Memorandum, that the standard of care to which the Department will hold itself liable in medical malpractice actions is to be that care reasonably expected by the

average citizen of the host country, represents a drastic change in the promise of the Department to the thousands of citizens employed overseas. As the District Court observed, the Gaither Memorandum constituted an "impermissible secret law." Had the Gaither Memorandum not been disclosed in the course of litigation in the District Court, present and future employees would never be aware of the adverse health consequences of serving their country in foreign outposts. This revelation presents grave implications for the members of *amici curiae*. The District Court's Memorandum and Order will be more particularly described in Petitioners' Reply to the Opposition to Petition for Certiorari.

This revelation in the District Court also fortifies petitioners' argument to this Court that minimal due process rights must attach to the administrative consideration of foreign-origin tort claims. The rights of procedural due process not only protect the individual claimant, but also the public at large. The events of this case starkly emphasize that primary concept of freedom. A secret process is inherently unreliable and leads to the destruction of the rights of all.

The Department regularly assigns employees to worldwide posts. Indeed, such availability for worldwide assignment is a condition of employment. *See* 3 Foreign Affairs Manual § 141.2. Some assignments are in developing countries where there are nonexistent or extremely limited medical facilities. In recognition of this hardship, the Department assigns American physicians and/or nurses to posts where available medical facilities and services are inadequate. *See* 3 Foreign Affairs Manual § 682.2. In addition, the Department provides that "eligible American employees or dependents who are unable to obtain suitable medical care abroad . . . for an overseas-incurred illness, injury, or medical condition may be authorized under certain circumstances by the post to travel to the United States to receive medical care."

3 Foreign Affairs Manual § 685.4-2. That the Department assigns medical staff to posts buttresses the view that Foreign Service employees and their families who are abroad will be provided the same standard of medical care and treatment as provided to stateside employees.

Foreign Service employees risk their lives to serve United States foreign policy interests abroad. As dedicated public servants, they should be entitled to the care promised by their government as a term of employment. And, if medical negligence occurs, the Departmental procedure established to address this issue should include adequate due process protections to ensure a merit-based tort compensation system. Without such a protection, every employee runs the risk that the right to competent medical care will be denied—as it was here—by the Department, perhaps for reasons entirely unrelated to the merits of the individual case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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